Supreme Court, U.S.
FILED

No. 10-744 SEP 30 2010

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IN THE
SUPREME COURT OF THE UNITED STATES

MATTHEW WALDRON,
PETITIONER

VS.

SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY,
RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether continuance and delays caused solely by the Defendant's public defender or retained counsel, as set forth in the attached statement of the case can give rise to a speedy trial violation?

2. Whether or not the actions of the public defender or retained counsel in not keeping the Plaintiff advised as to what was going on as to his consent to adjournments and delays violates the Plaintiff's right to speedy trial that he was seeking throughout the entire action?

LIST OF PARTIES

Petitioner
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Respondent:
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Dennis Jacobs, Chief Judge
Richard C. Wesley, Circuit Judge
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Thurgood Marshall U.S. Court House
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IN THE SUPREME COURT OF THE UNITES STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below:

The opinion of the United State Court of Appeals appears at Appendix A to the petition and is reported at February 11, 2010

The opinion of the Untied States District Court appears at Appendix B to the petitioner and is reported at July 13, 2010

The opinion of the New York State Court of Appeals appears at Appendix C to the petition and is reported at December 31, 2004The opinion of the Herkimer County Court appears at Appendix D to the petition and is reported at April 4, 2001

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 13, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

The date on which the highest state court decided my case was December 31, 2004 A copy of that decision appears at Appendix C.

The jurisdiction of this court is invoked under 29 U.S.C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the Untied States of America, Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

New York State Criminal Procedure Law §30.30 (1)(a). 1. Except as otherwise provided in subdivision three, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one section 210.20 must be granted were the people are not ready for trial within: (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony.

New York Civil Rights Law §12 (L.1909, c. 14) provides: "In all criminal prosecution, the accused has a right to a speedy and public trial..."

New York Criminal Procedure Law §30.20 (L. 1970, c. 996) which provides: "(1) After a criminal action is commenced, the defendant is entitled to a speedy trial." CPL 30.20 is considered a true "speedy trial" provision. See McKinney's Practice Commentaries, Criminal Law Vol. 11 A at pp. 187-192.

People v. Bruno, 300 A.D.2d 93 1st Dep't 2002
People v. Collins, 82 N.Y.2d 745 (1987)
People v. Soluri, 300 A.D.2d 988 (4th Dep't 2002)
People v. Santos, 68 N.Y.2d 859 (1986)
People v. Cortes, 80 N.Y.2s 9 (1992)

STATEMENTS OF THE CASE

Defendant was arrested on January 23, 2000 and arraigned on felony charges in local criminal court. A competency examination was ordered on February 1, 2000 and received on February 23, 2000. Defendant was held for action of the grand jury on April 12, 2000. He was indicted on December 14, 2000 and the People declared readiness on December 20, 2000 at time of arraignment.

New York Criminal Procedure Law §30.30(1)(a) provides that where the People are not ready for trial within six months of commencement of a criminal action wherein the defendant is accused of a felony, a motion to dismiss an indictment must be granted.

In March 2000 the District Attorney informed newly retained defense counsel that in the event the case were to be presented to the Grand Jury any plea offer would have to carry a determinate sentence of twenty years. The District Attorney cautioned that he was mindful of the statutory period within which he had to present the case to the Grand Jury. Accordingly on July 11, 2000 counsel mailed a letter to the District Attorney containing the following request and offer:

> "In light of these understandings, I would request, therefore, on behalf of the defendant who joins in this request, that we schedule a dispositional hearing date on or before September 15, 2000, and the defendant does hereby waive any speedy trial or other rights that he may have by your concurring with this request." [emphasis applied]

The defendant did not sign the July 11, 2000 letter, nor did counsel show this letter to defendant. Counsel also sent defendant's psychiatric report to the District Attorney in August 2000.

The District Attorney made no written response to the July 11, 2000 letter. He did not request defendant to sign the letter, did not request formal written waiver from the defendant, did not schedule the case for disposition in court, did not schedule a "dispositional hearing" with counsel, did not make or communicate any new offers of pre-indictment disposition, and made no effort to indict the defendant within the statutory time. In fact, neither the District Attorney nor defense counsel took any steps in negotiating a disposition of the case prior to indictment.

On November 30, 2002 defendant filed a pro se motion seeking dismissal of the indictment on speedy trial grounds. Defendant also discharged his counsel. County Court assigned an attorney to represent the defendant. Upon receipt of this motion the District Attorney immediately scheduled the case for Grand Jury. An indictment was returned on December 14, 2000. On December 20, 2000 defendant pled not guilty and the People declared readiness. Defendant rejected new, more favorable offers of disposition. He stood trial and was found guilty by jury verdict on July 12, 2001. The defendant was sentenced on August 20, 2001. A notice of appeal was filed.

On February 28, 2001, prior to trial, the County Court held a hearing on the defendant's speedy trial motion. The Court denied the motion. It held that "It is clear that defense counsel not only consented to the delay, but specifically requested the delays to attempt to negotiate a favorable plea bargain." Based on the testimonies of the District Attorney and defense counsel, the Court concluded that defense counsel conducted discovery and plea negotiations from March 20, 2000 until the filing of defendant's motion in November and that such time as not to be held against the District Attorney.

The defendant's testimony at the hearing can be summarized as follows: counsel "kept me in the dark" and never told him about any "dispositional hearing" or court dates; defendant never told his attorney that he was going to "waive anything"; that counsel sent letters to the District Attorney "blindly, " that counsel "Never told me anything about plea negotiations; that defendant never heard of a 20 year offer or a 12 years until the pro se motion was filed." The defendant heard of a 12 year offer from his newly appointed counsel on the day before the case was presented to the Grand Jury. In short, the defendant maintained that he had no knowledge of, and did not authorize, a delay strategy and a waiver of his speedy trial rights; that he was never informed of, an did not sign, and did not receive a copy of counsel's July 11, 2000 letter to the District Attorney; that the July letter moreover, did not express consent to delay in Grand Jury proceedings but was a request for a "dispositional hearing" contingent upon concurrence of the District Attorney. Defendant testifies that he had but two meetings with his counsel, the second meeting lasting just ten minutes.

The District Attorney testified that the delay in proceeding to Grand Jury was at the request of defense counsel for the purposes of presenting additional information to obtain a better plea disposition; that he had originally scheduled for

Grand Jury but had put it off at request of counsel; that he discussed the statutory time limit for presentation with defense counsel. The District Attorney also testified that upon receipt of defendant's motion to dismiss he immediately scheduled the case of Grand Jury and immediately spoke to (former) defense counsel who requested another opportunity to convince the defendant about the inadvisability of the motion to dismiss.

Defendant's counsel (who was subpoenaed by The People) testified that on March 20, 2000 and subsequently he had numerous conversations with the District Attorney concerning a negotiated disposition; that the District Attorney offered a minimum offer of 20 years; that even without consulting defendant he told the District Attorney that such offer was not satisfaction; that he commenced a strategy of delay; that the explained the six month statute period to defendant who agreed to a waiver of the statue; that he also spoke to defendant's father; that the District Attorney said he would present the case to the Grand Jury unless he had and answer to the original plea offer or say "some serious negotiations" by September 15, 2000; that he mailed a letter on July 11, 2000 to the District Attorney asking for a "dispositional hearing" by September 15, 2000; that he did not give a copy of the July letter to the defendant (although he stated that defendant somehow

knew of its contents before and after it was mailed); that plea negotiations stated shortly after July 11, 2000 and continued thereafter on a weekly basis; that before November 2000 he discussed a 12 year offer with the District Attorney (he did not testify that he conveyed such offer to the defendant); that he tried to secure a better offer after defendant filed the November motion to dismiss the indictment.

The Appellate Division held that on the record defendant was not denied his statutory right to speedy trial; that the record established that between July 11, 2000 and November 30, 2000 defendant's counsel repeatedly and explicitly requested the prosecution to postpone Grand Jury presentation; that counsel further repeatedly and expressly waived defendant's speedy trial rights for the purpose of pursuing a favorable plea bargain for the defendant; that counsel had authority to bind defendant with regard to waiver of his rights under CPL 30.30; that the record established that following discussions with counsel, defendant consented to the delay and to counsel's waiver of defendant's speedy trial rights.

> Two justices dissenting agreed that the indictment should be dismissed on speedy trial grounds. They reasoned: "Contrary to the

majority's conclusion, moreover, the People did not establish that counsel effectively waived defendant's speedy trial rights... Neither defense counsel nor defendant consented to any delay or waived defendant's speedy trial rights on the court record... and absent such a record, the delay is chargeable to the People and the purported waiver of defendant's speedy trial right is ineffective. Defense counsel's letter of July 11, 2000, requesting a delay in the Grand Jury presentment does not support the exclusion of any period from the People's readiness time. Further, the delay requested by defense counsel is limited to the 66-day period from July 11, 2000 until September 15, 2000. The remainder of the period incident to the plea negotiations is chargeable to the People. At best, therefore, the People establish 90 days of excludable time, leaving 242 days chargeable to them... we could grant the defendant's motion, dismiss the indictment and remit the matter for proceedings pursuant to CPL 470.45."

The Court of Appeals concluded that from March 20, 2000 defense counsel began a deliberate strategy of delay; that he communicated this strategy to defendant; that he had

conversations with the District Attorney on more than one occasion indicating that he wished to waive the statutory period to get a better sentence for the defendant; that he sent the July 11, 2000 letter; that between July and November he spoke to the District Attorney frequently; that the District Attorney eventually reduced the plea offer by eight years. The Court of Appeals did acknowledge that defendant contradicted counsel's claim that he know of counsel's intentional delay strategy. Nevertheless, the Court concluded that defense counsel explicitly waived the speedy trial right; that the delay worked in defendant's favor; that the defendant knew of and consented to counsel's strategy; that although counsel did request a hearing for September 15, 2000 he and the District Attorney remained in plea negotiations through November so that the period between July 11 and November 30, 2000 (filing of the pro se motion) was not chargeable to the People. The Court did observe that "The July letter could have been clearer, and prosecutors would be well advised to obtain unambiguous written waivers in situations like these..." However, the Court concluded that the July letter was a waiver of any prosecutorial delay between July 11 and November 30 in light of the negotiations on behalf of the defendant that preceded and followed it as testified to by counsel. The Court held that there is no requirement for counsel's letter of July 11, 2000 to be filed with the Court

contemporaneously. The Court also held that there was not constitution violation of speedy trial rights.

REASONS FOR GRANTING THE PETITION

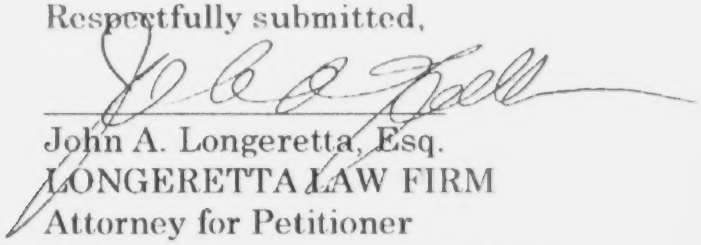
Petitioner alleges that his federal constitutional claim was fairly presented in federal constitutional terms at the highest state court from which a decision can be had. Petitioner denies the allegation that his assertion of statutory speedy trial rights before the Appellate Division and the Court of Appeals of the State of New York presented only an issue of State law not cognizable in a federal habeas corpus petition.

Petitioner claims that he is entitled to habeas corpus relief because the State court adjudication resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding and has resulted in the deprivation of his liberty without due process of law and in denial of equal protection laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: September 29, 2010

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MATTHEW WALDRON,
Petitioner,
vs.

No. 9:07-cv-001 54-JKS
MEMORANDUM
DECISION

SUPERINTENDENT, Attica
Correctional Facility,
Respondent.

Petitioner Matthew Waldron, a state prisoner appearing through counsel, has filed a petition for habeas co relief under 28 U.S.C. § 2254. Waldron is currently in the custody of the New York Department of Correctional Services, incarcerated at the Attica Correctional Facility. Respondent has answered the Petition, and Waldron has replied.

I. BACKGROUND/PRIOR PROCEEDINGS

Following a trial by jury, Waldron was convicted in the Herkimer County Court of three counts of Sodomy in the First Degree (N.Y. Penal Law § 130.50(3)), and one count each of Promoting an Obscene Sexual Performance by a Child (N.Y. Penal Law § 263.10), Use of a Child in a Sexual Performance (N.Y. Penal Law § 263.05), and

Possessing an Obscene Sexual Performance by a Child (N.Y. Penal Law § 263.11). The Herkimer County Court sentenced Waldron to various determinate and indeterminate terms of incarceration, most of which were ordered to run consecutively, aggregating 54 to 60 years.

Waldron timely appealed his conviction and sentence to the Appellate Division, Fourth Department. The Appellate Division affirmed his conviction but found the sentence to be unduly harsh and ordered the sentence be modified accordingly.[1] The New York Court of Appeals granted leave to appeal and affirmed the judgment of the Appellate Division on February 14, 2006.[2] Waldron timely filed his Petition for relief in this Court on February 9, 2007.

II. GROUNDS PRESENTED/DEFENSES

In his Petition Waldron raises a single ground: the failure of the District Attorney to indict within the time permitted by N.Y. Penal Law § 30.30 denied him a speedy trial. Respondent asserts no affirmative defense.[3]

III. STANDARD OF REVIEW

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[1] *People v. Waldron*, 787 N.Y.S.2d 547 (N.Y.A.D. 2004), aff'd 847 N.E.2d 367 (N.Y. 2005).

[2] *People v. Waldron*, 847 N.E.2d 367 (N.Y. 2005).

[3] See Rules—Section 2254 Cases, Rule 5(b).

Because the Petition was filed after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Consequently, this Court cannot grant relief unless the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" at the time the state court rendered its decision or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4] The Supreme Court has explained that "clearly established Federal law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [Supreme Court] as of the time of the relevant state-court decision."[5] The holding must also be binding upon the states; that is, the decision must be based upon constitutional grounds, not on the supervisory power of the Supreme Court over federal courts.[6] Thus, where holdings of the Supreme Court regarding the issue presented on habeas review are lacking, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly

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[4] 28 U.S.C. § 2254(d); see Williams v. Taylor, 529 U.S. 362, 404-06 (2000); see also *Lockyer v. Andrade*, 538 U.S. 63, 70-75 (2003) (explaining this standard).

[5] *Williams*, 529 U.S. at 412.

[6] *Early v. Packer*, 537 U.S. 3, 10(2002).

established Federal law.'"[7] When a claim falls under the "unreasonable application" prong, a state court's application of Supreme Court precedent must be objectively unreasonable, not just incorrect or erroneous.[8] The Supreme Court has made clear that the objectively unreasonable standard is a substantially higher threshold than simply believing the state court determination was incorrect.[9] In a federal habeas proceeding, the standard under which this Court must assess the prejudicial impact of constitutional error in a state court criminal trial is whether the error had a substantial and injurious effect or influence in determining the jury's verdict.[10] Petitioner bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated."[11]

In applying this standard, this Court reviews the last reasoned decision by the state court.[12] In addition, the state court's findings of fact are presumed to be correct unless

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[7] *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (alterations by the Court); see *Wright v. Van Patten*, 552 U.S. 120, 127 (2008) (per curiam).

[8] *Wiggins v. Smith*, 539 U.S. 510 (internal quotation marks and citations omitted).

[9] *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

[10] *Fry v. Pliler*, 551 U.S. 112, 121 (2007) (adopting the standard set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

[11] *Hawkins v. Costello*, 460 F.3d 238, 246 (2d Cir. 2006) (internal quotation marks and citation omitted).

[12] *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991); *Jones v. Stinson*, 229 F.3d 112, 118 (2d Cir. 2000).

the petitioner rebuts this presumption by clear and convincing evidence.[13]

IV. DISCUSSION

The following are the facts, as relevant to the Petition before this Court, as recited by the New York Court of Appeals:

> Defendant Matthew Waldron was arrested in the Village of F on January 23, 2000 after police obtained surveillance evidence showing he had engaged in several obscene acts with children. On February 1, 2000, the Flerkimer Village Court ordered a psychiatric and competency exam pursuant to article 730 of the Criminal Procedure Law. The report was filed February 24, 2000.
>
> On March 20, 2000, defendant's assigned counsel was replaced by retained counsel, George Aney, who soon thereafter initiated negotiations with the prosecutor. At the outset, the District Attorney, Michael Daley, told Aney that if the children had to testify at a grand jury proceeding, the minimum offer would be a 20-year determinate sentence. According to Aney, he

[13] 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

then began a deliberate strategy of delay, hoping that the District Attorney's offer would improve with time, a tactic that Aney communicated to his client. Aney later testified that "(o}n more than one occasion," he had conversations with District Attorney Daley indicating that he wished to waive the statutory time period in order to reserve the possibility of negotiating a better sentence for his client. In a letter dated July 11, 2000, Aney wrote to the District Attorney:

> "In connection with the above captioned matter, I have been meeting with the defendant and his father for the past few months regarding a possible disposition of this case without the necessity of requiring the children to testi before the Grand Jury....
>
> "In light of these undertakings, I would request, therefore, on behalf of the defendant who joins in this request, that we schedule a dispositional hearing date oil or before September 15, 2000, and the defendant does hereby waive any speedy

trial or other rights that he may have by your concurring with this request."

Between July and November, Daley and Aney spoke frequently and, eventually, the District Attorney reduced the offer by eight years.

Defendant Waldron, nevertheless, sought and paid for the legal advice of another inmate, and on November 30, 2000, filed a pro se speedy trial motion and discharged Aney. In his pm se motion, he contended that he had been in custody 317 days without the commencement of a trial, in violation of CPL 30.30(1)(a).FNI Defendant was indicted on December 14, 2000 and arraigned on December 20, 2000, at which time the prosecutor announced his readiness for trial. The Herkimer County Court conducted a hearing on February 28, 2001 pursuant to the pro se CPL 30.30 motion. At the hearing, defendant contradicted Aney's claims that he knew of the intentional delay strategy. The court denied defendant's speedy trial motion.

FNI. CPL 30.30(1)(a) states:

> 1. Except as otherwise provided in subdivision three, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:
>
> (a) six months of the commencement of a criminal action wherein a defendant is accused of one or more offenses, at least one of which is a felony.[14]

Waldron argues that waiver of the speedy trial statute cannot be accomplished unilaterally by defense counsel without the defendant's consent and approval, it must be made knowingly and voluntarily by the defendant. The New York Court of Appeals, construing N.Y. Penal Law § 30.30, rejected Waldron's argument, holding that where Waldron's "counsel explicitly waived speedy trial rights in order to complete ongoing plea negotiations, such time is excludable."[15]

Before this Court, Waldron contends:

> [T]he dissenting (Justices Green, J.P. and Justice Hayes, S.) at the Appellate Division

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[14] *Waldron*, 847 N.R2d at 368.

[15] *Id.* at 369.

> correctly determined the issue of denial of speedy trial rights; namely, that the People did not establish that defendant's counsel effectively waived defendant's speedy trial rights nor that defense counsel, nor defendant consented to any delay or waived defendant's speedy trial rights; and that the People did not theet their burden to establish a record demonstrating the basis for any claim of excludible (*sic*) time.[16]

To the extent that Waldron raises an issue of the proper interpretation and application of State law, in this case, N.Y. Penal Law § 30.30, it is beyond the purview of this Court in a federal habeas proceeding. It is a fundamental precept of dual federalism that the States possess primary authority for defining and enforcing the criminal law.[17] A fundamental principle of our federal system is "that a state court's interpretation of state law, including one announced on direct appeal of the challenged

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[16] Docket No. 1, p. 8.

[17] See *Engle v. Isaac*, 456 U.S. 107, 128 (1982). Federal courts must accept that state courts correctly applied state laws. *Bell v. Cone*, 543 U.S. 447,455 (2005); see also *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot reexamine a state court's interpretation and application of state law); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (it is presumed that the state court knew and correctly applied state law), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584 (2002).

conviction, binds a federal court sitting in habeas corpus."[18] This principle applied to federal habeas review of state convictions long before the passage of AEDPA.[19] A federal court errs if it interprets a state legal doctrine in a manner that directly conflicts with the state supreme court's interpretation of the law.[20] The New York Court of Appeals, the state's highest court, having spoken directly on the subject in this case, binds this Court.

Other than citing the Sixth Amendment speedy trial provision and arguing in broad terms that denial of his speedy trial rights under § 30.30 resulted in a denial of due process under the Constitution of the United States in his Traverse, Waldron presents no constitutional issue in his Petition. A petitioner may not transform a state-law issue into a federal one by simply asserting a violation of due process.[21] Nor may a federal court issue a habeas writ based upon a perceived error of state law, unless the error

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[18] *Bradshaw v. Richey*, 546 U.S. 74,76, (2005); see also West v. AT&T, 311 U.S. 223, 236 (1940) (" highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law.. .").

[19] See *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("state courts are the ultimate expositors of state law").

[20] See *Bradshaw*, 546 U.S. at 76-78 ("Because the Sixth Circuit disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law, its ruling on sufficiency of the evidence was erroneous.").

[21] See *Langford v. Day*, 110 F.3d 1380, 1389(9th Cir. 1996).

is sufficiently egregious to amount to a denial of due process under the Fourteenth Amendment.[22]

Even if Waldron properly presented a federal constitutional issue in his Petition before this Court, he would not prevail. Addressing the constitutional issue, the Court of Appeals held:

> Finally, we hold there was no constitutional violation of defendant's right to a speedy trial. In People v. Taranovich, 37 N.Y.2d 442, 373 N.Y.S.2d 79, 335 N.E.2d 303 [this Court stated the following factors should be examined when a defendant claims there has been a denial of his right to a speedy trial: (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay.
>
> Under the first factor, the extent or duration of the delay, we have a delay of almost a year. Although "the greater the delay the more probable it is that the accused will be harmed"

[22] *Pulley v. Harris*, 465 U.S. 37, 41(1984).

(id. at 445, 373 N.Y.S.2d 79, 335 N.E.2d 303), here it appears the delay helped defendant. Analysis of the second factor, the reason for the delay, shows defendant and his former lawyer were primarily responsible and also falls in the People's fivor. The third factor, the nature of the underlying charge, also falls in the People's favor as the grand ju ultimately indicted defendant on seven felony counts involving the sexual abuse of minors. This matter required delicate handling by the District Attorney, who sought to minimize further harm to the victims by making them testify.

The fourth factor, whether or not there has been an extended period of pretrial incarceration, falls in the defendant's favor, although we note that he chose to extend this pretrial incarceration by agreeing to a waiver. Analysis of the fifth

factor, whether or not there is any indication that the defense has been impaired by reason of the delay, again shows that defendant was not impaired because he received a better offer from the prosecutor as a result of waiting.

> Balancing these factors, we hold that defendant was not deprived of his constitutional right to a speedy trial.[23]

The seminal Sixth Amendment speedy trial case is *Barker v. Wingo*,[24] which is "clearly established law" under AEDPA. As the Supreme Court recently noted in applying *Barker*:

> The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy. . . trial." The speedy-trial right is "amorphous," "slippery," and "necessarily relative." *Barker*, 407 U.S., at 522, 92 S.Ct. 2182 (quoting *Beavers v. Haubert*, 198 U.S. 77,87,25 S.Ct. 573,49 L.Ed. 950 (1905)). It is "consistent with delays and depend upon circumstances." 407 U.S., at 522, 92 S.Ct. 2182 (internal quotation marks omitted). In Barker. the Court refused to "quantif[y] the right "into a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial. Id., at 522-525,92 S.Ct. 2182. Rejecting such "inflexible approaches," Barker established a

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[23] *Waldron*, 847 N.E.2d 370-71. 24407 U.S. 514 (1972).

[24] 407 U.S. 514 (1972).

> "balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id., at 529, 530,92 S.Ct. 2182. "[Some] of the factors" that courts should weigh include "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid.*[25]

This Court cannot say that the decision of the New York Court of Appeals was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[26] Nor can this Court find that the state court unreasonably applied the correct legal principle within the scope of *Andrade Wilhiams-Landrigan; i.e.*, the state court decision was more than incorrect or erroneous, its application of clearly established law was objectively unreasonable.

V. CONCLUSION AND ORDER

Waldron is not entitled to relief on the ground raised in his Petition.

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[25] *Vermont v. Brillon* 555 U.S. ___, 129 S. Ct. 1283, 1290 (2009). 2628 U.S.C. § 2254(d).

[26] 28 U.S.C. §2254(d)

IT IS THEREFORE ORDERED THAT the Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED THAT the Court declines to issue a Certificate of Appealability.[27] To the extent the issues raised in the Pet tion were addressed by the New York Court of Appeals, no reasonable jurist could find that the decision was "objectively unreasonable." Any further request for a Certificate of Appealability must be addressed to the Court of Appeals. See Fed. R. App. P. 22(b); Second Circuit R. 22.

The Clerk of the Court is to enter final judgment accordingly.

Dated: February 11,2010.

/s/ James K. Singleton, Jr.

JAMES K. SINGLETON, JR.

United States District Judge

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[27] 2128 U.S.C. § 2253(c); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further") (internal quotation marks omitted).

APPENDIX B

N.0.N.Y.
07-cv-l 54
Singleton, I.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13 day of July two thousand ten,

Present:

Dennis Jacobs,
Chief Judge,
Richard C. Wesley,
Denny Chin,
Circuit Judges.

Matthew Waldron, 10-902-pr
Petitioner-Appellant,

v.

Superintendent, Attica
Correctional Facility,
Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has hot made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); Miller-El v. G4ckrell, 537 U.S. 322 (2Q03).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1339

KA 02—00077

PRESENT: GREEN, J.P., HURLBUTT, KEHOE, GORSKI, AND HAYES, JJ.

PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFF—RESPONDENT,

V MEMORANDUM

MATTHEW WALDRON, AND ORDER
DEFENDANT-APPELLANT.

REBECCA L. WITTMAN, UTICA, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, SR DISTRICT ATTORNEY, HERKIMER (PRESCOTT E. KLOSNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered August 30, 2001. The judgment convicted defendant, upon a jury verdict, of sodomy in the first degree (three counts), promoting an obscene sexual performance by a child, use of a child in a sexual performance and possessing an obscene sexual performance by a child.

It is hereby ORDERED that the judgment so appealed from be and the same hereby is modified as a matter of discretion in the interest of justice by directing that the determinate terms of incarceration of 17 years imposed on the second and third counts of the indictment, respectively, shall run consecutively to one another, but that all of the other terms imposed shall run concurrently

with those terms and with one another and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him of sodomy in the first degree (three counts) (Penal Law former § 130.50 use of a child in a sexual performance (263.05), promoting an obscene sexual performance by a child (263.10), and possessing an obscene sexual performance by a child (263.11) . Defendant was sentenced to various determinate and indeterminate terms of incarceration, most of which were ordered to run consecutively to one another, aggregating 54 to 60 years.

Defendant was not denied his statutory right to a speedy trial (see generally CPL 30.30) as a result of preindictment delay. The record establishes that, between July 11 and November defendant's former counsel repeatedly and explicitly requested that the prosecution postpone the presentation of defendant's case to the grand jury, and further repeatedly and expressly waived the Defendant's speedy trial rights, all for the purpose of pursuing a favorable plea bargain for defendant (see People *v Chevalier*, 226 AD2d 925,928, *lv denied* 88 NY2d 934; *People v Trepasso*, 197 AD2d 891, *lv denied* 82 NY2d 854; *People v* Hudson, 167 AD2d 950, *lv denied* 77 NY2d 878; *People V Sharpe*, 115 AD2d 996, 996—997, *lv denied* 67 NY2d 889) . Exclusion of that 142-day period, coupled with other periods totaling 24 days that defendant concedes must be excluded, renders timely the People's declaration of readiness (see *Chevalier*, 226 AD2d at 928; *Trepasso*, 197 AD2d at 891; *Hudson*, 167 AD2d at 950) . Former defense counsel had authority to bind defendant with regard to a waiver of his rights under CPL 30.30 (see *Trepasso*, 197 AD2d at 891; see also *People v Jenkins*, 302 AIJ2d 978, *lv denied* 100 NY2d 562) . Further, the record establishes that, following discussions with counsel, defendant himself consented to the prosecution's delay in presenting the case to the grand jury and counsel's waiver of defendant's right to a speedy trial.

The dissent incorrectly focuses on the excludability, pursuant to CPL 30.30 (4) (b), of specific periods of "delay resulting from a continuance granted by [Court] at the request of, or with the consent of, the defendant or his counsel" (see generally *People v Smith*, 82 NY2d 676, 678; *People v Liotta*, 79 NY2d 841, 843; *People v Soluri*, 300 AD2d 988, 989, *lv denied* 100 NY2d 543; *People v Suppe*, 224 AD2d 970, 971) . Here, for as long as the defense was explicitly seeking a postponement of the grand jury proceeding, and for as long as the prosecution was acceding to that request, there was no court proceeding and no "continuance." Thus, the People cannot — and do not — rely on section 30.30 (4) (b) . Consequently, those cases holding that it is the People's burden to make a record "demonstrating the basis for any claim of excludable time" under section 30.30 (4) (b) are inapposite here (*Suppe*, 224 AD2d at 971; of. *Smith*, 82 NY2d at 678; *People v Cortes*, 80 NY2d 201, 215—216; So 300 AD2d at 989; *People v Coxon*, 242 AD2d 962, 963)

For similar reasons, we conclude that defendant waived his constitutional right to a speedy trial as well (see *People v Rodriguez*, 50 NY2d 553; *People v Smith*, 272 AD2d 679, 681, *lv denied* 95 N 938; *Trepasso*, 197 AD2d at 891; of. *People v White*, 32 NY2d 393, 399) . We conclude, in any event, that defendant was not deprived of his constitutional right to a speedy trial under the circumstances of this case (see *People v. Taranovich*, 37 NY2d 442, 445·447).

Nor was defendant denied his right to effective assistance of counsel as a result of trial counsel's failure to object to the assertedly deficient opening statement of the prosecutor. Rather, the evidence, the law and the circumstances of this case, viewed in · totality and as of the time of the representation, establish that defendant received meaningful representation (see *People v Baldi*, 54 NY2d 137, 147) . Additionally, defendant was not deprived of a fair trial by prosecutorial misconduct on summation

(see *People v Peckham*, 8 AD3d 1121, *lv denied* 3 NY3d 679; *People v West*, 4 AD3d 791, 792)

However, the sentence imposed is unduly harsh or severe. Thus, as a matter of discretion in the interest of justice (see CPL 470.15 [[we modify the judgment by directing that the determinateterms of 17 years imposed on the second and third counts of the indictment, respectively, shall run consecutively to one another, but that all of the other terms imposed by the court shall run concurrently with those terms and with one another.

All concur except GREEN, J.P., and HAYES, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. In our view, County Court erred in denying defendant's motion to dismiss the indictment pursuant to CPL 30.30 (1) (a). It is undisputed that this action was commenced on January 23, 2000 with the filing of the felony complaint (see *People v Lomax*, 50 NY2d 351, 356), and that the People did not announce readiness on the record until defendant's arraignment on December 20, 2000, 332 days later. Because defendant met his initial burden on the motion by alleging that the People failed to announce readiness within the statutorily required period (see 30.30 [1] [a]), in this case 182 days, the People bore the burden of establishing that certain periods of delay are excludable pursuant to CPL 30.30 (4) (see *People v Berkowitz*, 50 NY2d 333, 349) . Apart from a delay of 24 days resulting from the competency determination, which defendant concedes was properly excluded pursuant to CPL 30.30 (4) (a) (see *People v. Kearney*, 215 AD2d 693, 694), the People failed to establish that any of the remaining preindictment delay comes within any of the statutory exclusions. In its decision, the court cited CPL 30.30 (4) (b), which excludes "the period of delay resulting from a continuance granted by the court at the request of, or with the consent of, the defendant or his counsel." The People, however, may not rely upon that exclusion. "The statute does not exclude generic periods of delay requested or consented to by defendant or his counsel, but is limited to

those periods of delay resulting from a continuance or adjournment of court proceedings granted by the court at the request of defendant or with his consent" (People *v. Suppe*, 224 AD2d 970, 971) . Thus, even if defense counsel requested that the prosecutor delay presentment to the grand jury while plea negotiations continued, "there was no continuance or adjournment of court proceedings, with or without the consent of defendant or at his request, and hence no period of exclusion pursuant to CPL 30.30 (4) (b)" (id.)

Contrary to the majority's conclusion, moreover, the People did not establish that defense counsel effectively waived defendant's speedy trial rights. " People bear the burden of establishing a record demonstrating the basis for any claim of excludable time" (id.; see *People v. Smith*, 82 NY2d 676, 678; *People v. Soluri*, 300 AD2d 988, 989, lv denied 100 NY2d 543; *People v Brown*, 206 AD2d 326, 327, lv denied 84 NY2d 933). Here, "no contemporaneous record was made of the reason for" any of the delay between the conclusion of the competency determination and the announcement of readiness (*People v Cortes*, 80 NY2d 201, 215). Neither defense counsel nor defendant consented to any delay or waived defendant's speedy trial rights on the court record. It is the People's burden to ensure that such a contemporaneous court record is made, and absent such a record the delay is chargeable to the People and the purported waiver of defendant's speedy trial rights is ineffective (see generally *Smith*, 82 NY2d at 678; *Soluri*, 300 AD2d at 989) . Defense counsel's letter of July 11, 2000, requesting a delay in the grand jury presentment to permit further plea negotiations was never made a part of the court record and therefore does not support the exclusion of any period from the People's readiness time (see generally *Cortes*, 80 NY2d at 215-216) . Further, the delay requested by defense counsel is limited to the 66—clay period from July 11, 2000 until September 15, 2000. The remainder of the period incident to the plea negotiations is chargeable to the People (see *Soluri*, 300 AD2d at 989; *People v Coxon*,

242 AD2d 962, 963; *Suppe*, 224 AD2d at 971; *Brown*, 206 AD2d at 327). At best, therefore, the People established 90 days of excludable time, leaving 242 days chargeable to them. Because that period exceeds the statutory maximum, we would grant defendant's motion, dismiss the indictment and remit the matter for proceedings pursuant to CPL 470. 45

Entered: December 30, 2004 JOANN N. WAHL
Clerk of the Court

APPENDIX D

STATE OF NEW YORK
SUPREME COURT COUNTY OF HERKIMER

THE PEOPLE OF THE STATE
OF NEW YORK Indictment #00-074

-vs-

MATTHEW WALDRON,
Defendant.

KIRK, P.L., A.J.S.C.:

DECISION

The above matter is before the Court on an indictment charging four counts of Sodomy First Degree, Promoting an Obscene Sexual Performance by a Child, Use of a Child in a Sexual Performance and Possession of an Obscene Sexual Performance of a Child. The defendant has brought a pro se Criminal Procedure Law Section 30.30 motion.

The Court directed that a hearing be held in connection with the defendant's motion which was held on February 28, 2001. Based upon the testimony and exhibits presented at the hearing, the filed indictment and papers filed with this Court, the facts are found to be as follows:

The defendant was arrested on January 23, 2000 with the assistance of a c informant. The defendant gave oral and video confessions on that date. The defendant was initially assigned Attorney U. Gerald Fiesinger, but on March 20, 2Q00 Attorney George F. Aney was privately retained. It should be noted that Attorney Aney is one of the most experienced and competent criminal attorneys in Central New York, but this defendant has admittedly

disregarded the advice of Attorney Aney (whose services have since been terminated), and his present attorney, Bart M. Carrig, another highly regarded criminal attorney, in favor of an inmate in a state correctional facility who is serving a lengthy sentence.

At the hearing, Attorney Aney testified that he was provided MI disclosure by the District Attorney's Office and that the initial offer of the District Attorney, Michael B. Daley, w a 20- year sentence and that the offer would increase in the event the young alleged victims were required to testify before the grand jury. The testimony of Mr. Daley confirmed that of Attorney Aney regarding the offer made and its contingency that the alleged victims not have to endure giving grand jury testimony.

Aney further testified that based upon this position he informed his client that he would employ a defense tactic of delay, which he had found successful in the past, hoping that the offer would improve over a period of time. Mr. Aney stated his client was aware that this was the - tactic to be invoked.

Mr. Daley stated that Mr. Aney, after reviewing the case, felt that it would be an extremely difficult case to win and specifically requested that there be no grand jury presentment. The District Attorney further testified that regular and weekly contact occurred between himself and Mr. Aney in an attempt to resolve the case and that in November, 2000, with the victims' consent, the offer was reduced to 12 years.

Exhibits 1, 2, 3 and 4, communications received from Attorney Aney, were introduced to substantiate the People's position and the District Attorney's testimony.

The District Attorney concluded by stating that as soon as the pro se motion was received (it was served by the defendant's father who paid a prison inmate $3000.00 to prepare and not one of defendant's attorneys) the case was

presented on the next grand jury date and an indictment handed up.

Attorney Aney specifically testified, and his letters indicate, that the 30.30 time limits were waived and that the delays in this matter were at his request.

The defendant testified that there was no signed waiver and no court dates during this extended delay.

There are additional facts winch need to be pointed out. First, the delay successfully resulted in an eight year reduction in the offer by the District Attorney. Second, Attorney Aney was discharged the same day the 30.30 motion was filed, November 30, 2000, and that the 30.30 motion was filed without the knowledge of Attorney Aney. Third, that the defendant, at the request of his initial attorney, was examined pursuant to CPL Article 730 and the doctor found him competent to proceed. This information was in the lower court papers submitted to this Court in the form of a divestiture filed April 12, 2000 which included an April it 2000 letter from Attorney Aney waiving a preliminary exam. Fourth, this defendant is being advised and accepting advice from a prison inmate contrary to the advice, of qualified attorneys.

The indictment in this matter was handed up and filed on December 14, 2000 and attached to the indictment was a written Notice of Readiness. At the defendant's arraignment on December 18, 2000 the People orally stated their readiness.

Based on the defendant's 30.30 motion and omnibus motions, the matter was adjourned with a suppression hearing occurring on April 2, 2001 and trial scheduled for April 18, 2001. At the request of the defense counsel, with the defendant's consent, the trial has been adjourned.

CONCLUSIONS OF LAW

Defendant's motion for a dismissal of this matter based on Constitutional speedy trial standards and on the basis of Criminal Procedure Law Article 30 is denied. Civil Rights Law: Section 12 is the New York Statute declarative of the U.S. Constitution and common law mandates, but New York State has made the right one of legislative decree, CPL Article 30, not purely a constitutional mandate.

CPL Section 30.30(l)(a) clearly states that the People must be ready for trial on a felony within six months. Subdivision 4 provides the Court with the guidance to determine what time periods may be excluded from the six-month period, which is the real question before the Court.

The documents submitted to this Court from the Lower Court show that the Village Justice signed an Order for Psychiatric Examination on February 1, 2000. The report was forwarded on February 24, 2000. These 24 days are clearly excluded from the si3c-month period. From the Village Court commitments, it appears there was a return date of March 22, 2000 after Mr. Aney was retained with no appearance by Mr. Aney on that date and no other appearances in the Village Court occurred due to the divestiture on April 12, 2000.

Both the District Attorney and Attorney Aney stated that following Mr. Aney being retained in March, 2000, discovery and plea negotiations commenced and continued up to Attorney Aney being discharged and the 30.30 motion filed. Fourteen days following the filing of the 30.30 motion, the defendant was indicted.

Based on the above finding, the period from April 1,2000 to November 30, 2000 is also excluded. It is clear the defense counsel not only consented to the delay, but specifically requested the delays "to attempt to negotiate a favorable plea bargain." Such periods of time are not counted for 30.30 purposes. *People v. Hudson* 167 A.D.2d 950 (1990 4 Dept).

Therefore, based upon the excluded periods set forth in CPL 30.30(4)(a) and (b), the defendant's motion for dismissal is denied.

The above constitutes the Decision of this Court.

Dated: April 4, 2001
Herkimer, New York

ENTER,
/s/ Patrick L. Kirk
Acting Justice,
Supreme Court